NO. 79-6674

IN THE SUPREME COURT OF THE UNITED STATES
_____ Term, 1980

RECEIVED
MAY 28 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Charles Johnson, Petitioner

vs.

United States of America, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

- - - - - - - - - - - -

Pursuant to Rule 53 (1) of the Rules of this Court, Petitioner, Charles Johnson, asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of cost and to proceed in Forma Pauperis. The Petitioner's Affidavit in support of this Motion is attached hereto.

Dated: May 25, 1980.

CHARLES H. SCHAFFNER
Counsel for Petitioner
115 Park Place
Covington, Kentucky 41011
(606) 491-2100

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Charles Johnson, Petitioner

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AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

- - - - - - - - - - - - - - - - - -

I, Charles Johnson, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees state:

1. Because of my poverty, I am unable to pay the costs of said cause.

2. I am unable to give security for the same,

3. I believe that I am entitled to the redress I seek in said cause.

4. This review is sought in good faith.

5. The nature of said cause is briefly stated as follows: A decision by the United States Court of Appeals for the Sixth Circuit affirming my conviction in the United States District Court for the Eastern District of Kentucky of one (1) count of Conducting An Illegal Gambling Business in violation of 18 USC 1955.

Further Affiant sayeth naught.

Charles Johnson

CHARLES JOHNSON

Subscribed and sworn to before me by Charles Johnson this 27th day of May, 1980.

37 11/14/81
Commission Expires

Notary Public, Kentucky

Presented by:

Charles H. Schaffner
Attorney for Petitioner

NO. 79-6674

IN THE SUPREME COURT OF THE UNITED STATES

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Charles Johnson, Petitioner

vs.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

CHARLES H. SCHAFFNER
Counsel for Petitioner
P.O. Box 66
Florence, Kentucky 41042

I hereby certify that I have served the foregoing Petition for Writ of Certiorari on the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and on James Arehart, United States Attorney, Federal Building, Lexington, Kentucky 40501, by mailing a copy thereof in conformity with Part VIII of the Rules of this Court this 25th day of May, 1980.

CHARLES H. SCHAFFNER

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18 U.S.C. #1955

Kentucky Revised Statute 528.010 et seq.

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

_____Term, 1980

Charles Johnson, Petitioner

vs.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

- - - - - - - - - - - - - - - - -

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on April 29, 1980, (Petition for rehearing not filed) affirming the criminal conviction of Petitioner by the United States District Court for the Eastern District of Kentucky of one (1) count of Conducting an Illegal Gambling Business in violation of 18 USC 1955.

## OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is a non-reported case and copied herein as Appendix "B".

## JURISDICTION

Jurisdiction of this Court is based on 28 USC #1254 and #2101 and Part V of the Rules of this Court. Petitioner is a party to a criminal action on which judgment was rendered in the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court for the Eastern

District of Kentucky.

## QUESTIONS PRESENTED

The questions to be presented by this Petition for Writ of Certiorari were all presented to the District Court by Motions contained in the Record of that Trial and were renewed and preserved at each appropriate stage of that proceeding and were presented again to the United States Court of Appeals for the Sixth Circuit in the brief submitted to that Court by Petitioner, herein; and those questions are as follows:

I. Whether this Court should adopt a new standard as concerns the granting of separate trials to co-defendants, whereby a co-defendant is unable to testify or be called as a witness due to the jeopardy that attaches with said witnesses taking the stand?

II. Whether this Court should adopt a standard whereby the elements of 18 USC 1955, should be clariried and as to what is a substantially continuous business operation for a period in excess of thirty days?

III. Whether this Court should adopt a stricter interpretation as to inflamatory arguments of counsel in closing arguments for the purpose of determining when a mistrial should be granted?

## STATUTORY PROVISIONS INVOLVED

Title 18 USC #1955.

Kentucky Revised Statute 528.010 et seq.

## STATEMENT OF THE CASE

The Defendant/Appellant, Charles Johnson, and five (5) other defendants, were indicted by a Grand Jury of the United States District Court, Eastern District of Kentucky, Covington. The indictment contained one (1) count. Count I charges all defendants with Gambling, a violation of Title 18 USC 1955, from or about August 1, 1977 up to August 25, 1977. The United States in defense called approximately seventeen witnesses in trial that lasted ten days. The jury, after submission of the case to wit, found Defendant/Appellant, Charles Johnson, guilty on Count I. The case was set for oral argument and was heard on Monday, April 14, 1980, by the Sixth Circuit Court of Appeals, Cincinnati, Ohio. On April 29, 1980, the Sixth Circuit Court of Appeals affirmed the conviction in an opinion dated April 19, 1980.

All of the issues raised in this Petition for Writ of Certiorari were raised in a time and a manner in the United States District Court aforesaid and the United States Court of Appeals For The Sixth Circuit.

## REASONS FOR GRANTING WRIT

The reasons for granting this Writ are that the questions presented involve areas in which the law as announced by the various Circuit Courts of Appeals are in conflict, or the law as applied in this case is in conflict with decisions of this Court. The issue of gambling is a particularly sensitive area and the opinions by the various courts would seem not to be in agreement. In the area as concerns a separation of defendants for trial purposes it would seem that the law to date is contradictatory and is discriminatory against those individuals either charged in a conspiracy case or in the case at bar, a case involving gambling.

In addition, there should be a definitive ruling by the Court based upon a review of all the law as to what is inflamatory argument and what action the Trial Court should take when such arguments occur.

I.

WHETHER THIS COURT SHOULD ADOPT A NEW STANDARD AS CONCERNS THE GRANTING OF SEPARATE TRIALS TO CO-DEFENDANTS, WHEREBY A CO-DEFENDANT IS UNABLE TO TESTIFY OR BE CALLED AS A WITNESS DUE TO THE JEOPARDY THAT ATTACHES WITH SAID WITNESSES TAKING THE STAND?

Rule 14, of the Federal Rule of Criminal Procedure states as follows:

> RELIEF FROM PREJUDICIAL JOINDER
>
> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

The Supreme Court in Bruton v. United States, 391 U.S.

123, (1968) stated that a defendant's inability to cross-examine a co-defendant denies the defendant the right of cross-examination secured by the Confrontation Clause of the U.S. Constitution. In the instant case, several of the defendants had prior felony records and the Defendant, Charles Johnson was precluded from calling them as defense witnesses since all defendants indicated they would assert their 5th Amendment right to refuse to testify. The Government well knew this could be the result when the indictment was returned and the defendant was injured by the Court refusing to sever his trial so the other defendants could have been called separately as witnesses. The examination of the witness, CATHY COLE, and using her transcript of testimony from the Grand Jury to elicit and establish so called facts from her are akin to the BRUTON and DOUGLAS cases expounded upon in the above cited BRUTON case.

Rule 8 (b) and 14 of the Federal Rules of Criminal Procedure indicate the joinders are promoted so as to save time and money but only wherein this can be done without substantial prejudice to the right of the defendant to a fair trial. Daly v. United States, 231 F. 2d 123. The Defendant, CHARLES JOHNSON, asserts that his right to freedom, his right to confrontation, his right for a non-prejudicial trial, is indeed substantial. JUDGE LEHMAN of the New York Court of Appeals, states it most concisely and eloquently in his dissenting opinion in People v. Fisher, 249 N.Y. 419, 432, 164, N.E. 336, 341;

> "We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them...We destroy the age-old rule which in the past has been regarded as fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any

> party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high."

No amount of time and money saved can justify the loss of the smallest amount of confrontation suffered by the defendant in the instant case. Defendants should not be made to suffer because of the lack of foresight or competence exhibited by the U.S. Congress and the President of the United States in not appointing sufficient number of Judges to the bar for the Eastern District of Kentucky so as to ensure that there are enough courts and judges to hear the pending case loads before the Federal Bar. To have the Defendant, CHARLES JOHNSON, suffer this fate is contrary to the U.S. Constitution and even as to Rule 14 of the Federal Rules of Criminal Procedure. Petitioner was therefor denied his constitutional right of confrontation and a new trial should be granted.

II.

WHETHER THIS COURT SHOULD ADOPT A STANDARD WHEREBY THE ELEMENTS OF 18 USC 1955, SHOULD BE CLARIFIED AND AS TO WHAT IS A SUBSTANTIALLY CONTINUOUS BUSINESS OPERATION FOR A PERIOD IN EXCESS OF THIRTY DAYS.

Section 1955 of Title 18 of the United States Code provides in part that:

Defendant CHARLES JOHNSON asserts that the government has failed to show a thirty (30) day continuous operation in the connection of the alleged gambling activity and the Federal statute relief upon to gain his conviction. Quoting directly from the United States v. Nerone, 563 F. 2d 836, the Court expounded on what was meant;

> "Substantially continuous operation does not require daily operation or proof of operation occuring sub-

> stantially around the clock but rather one that is operated upon schedule with regularity sufficient to take it out of the casual non-business catagory."

This case would seem to indicate that casual or interruptive type gatherings are not to fall within the purview of 18 U.S.C. (1955). In the case at Bar, these are four (4) reported gambling activities over a several month period. This is not sufficient to show a "substantively continuous operation". The United States Supreme Court seemed to indicate that it did not want to interfere with such small interruoted activities by it's language in the United States v. Schaefer, 510 F. 2d 1307, quoting:

> "In enacting this section Congress sought to draw the line between large-scale gambling operations and those that are relatively small and the statute is not meant to reach gambling operations that are of insignificant monetary proportions or those that are only occasional or intermittent in operation; only gambling that is continuous and substantial was to be proscribed."

All of the facts of this particular case would indicate an intermittent or occasional gathering for gambling activity. Defendant, CHARLES JOHNSON, reasserts that the four reported police observations do not establish a continuous and significant gambling operation which should fall within the Federal urview of 18 U.S.C. (1955). This is further eluded to in the case of the United States v. Bridges, 493 F. 2d 918, (1974).

> "Prohibition of this section against illegal gambling business was aimed at large-scale gambling businesses, and was not intended to subject almost any small gambling operation to federal regulation."

The case of United States v. Mattucci, 502 F. 2d 883, (1974), is much akin to that of United States v. Bridges, as reported above, in that you must have a substantially continuous operation in excess of thirty (30) days. The few, occasional,

social gatherings as reported in the Defendant, CHARLES JOHNSON case are not the type of syndicated gambling that 18 U.S.C. (1955) is meant to control. Therefore the District Court should have directed a verdict for the Defendant at the close of the government's case the close of all the evidence, and erred in it's instructions on the continuous 30 day period in it's instructions to the jury.

III.

WHETHER THIS COURT SHOULD ADOPT A STRICTER INTERPRETATION AS TO INFLAMATORY ARGUMENTS OF COUNSEL IN CLOSING ARGUMENTS OF COUNSEL IN CLOSING ARGUMENTS FOR THE PURPOSE OF DETERMINING WHEN A MISTRIAL SHOULD BE GRANTED?

Objection was made during the U.S. Attorney's closing arguments on behalf of the Defendant, JOHNSON and renewed after the close of all the evidence by request for a mistrial on the basis of the prejudicial and inflammatory statements made by the U.S. Attorney. ( T of E, 909 ) The U.S. Attorney alleged that the government's witness, CATHY COLE, was either intimidated or coerced into changing her testimony by the Defendant. ( T of E 883 ) There was no testimony to this extent nor was it touched upon in any other testimony presented by the government to substantiate this unfounded claim by the U.S. Attorney in his closing argument. Nowhere in the trial transcript is there any testimony to the extent that CATHY COLE was coerced or intimidated into changing her testimony. ( T of E 890 ) It is fundamental in the law that whether the U.S. Attorney is arguing the case or the attorneys for the Defendants are arguing the case, that they remain within the confines as to the questions and issued and as to the evidence that has been adduced during the trial. Counsel may not introduce into arguments statements un-

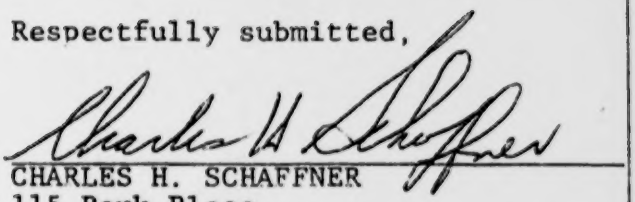
supported by evidence and without foundation as to trial facts. Bold assertions or expressions of belief being fact should not be tolerated. Representations by counsel that the opposing side has tampered with witnesses and where there is no evidence to that effect are highly reprehensible and are grounds for error. Klein v. State Farm Mutual Automobile Insurance Company, 15 ALR 3d 1138, 120 NW 2d 885. In the case at Bar, the U.S. Attorney has alleged that a witness was tampered with, and it is Defendant CHARLES JOHNSON'S belief that the Court should have sua sponte corrected said mis-statement at the time it was made, so as to prevent error. The Court failing to do this, a new trial should be granted to the Defendant CHARLES JOHNSON because of the U.S. Attorney's declarations and expressions. Hall v. United States, 150.U.S. 76 (1893).

The same result would seem to have been reached in the United States v. Agueci, 310 F. 2d 817 where the U.S. Attorney attributed a subornation to perjury charge against the Defendants. Although the Court in the Agueci case did not declare a new trial, it did so only because the weight of evidence was so overwhelming against the Defendant in that particular case. In the instant case at Bar the evidence was not overwhelming as to many facets, and the Court should direct that a new trial be granted to the Defendant CHARLES JOHNSON on the basis of the irregular and reprehensible arguments made by the U.S. Attorney in closing arguments.

## CONCLUSION

For the reasons set forth above, Certiorari should be granted.

Respectfully submitted,



CHARLES H. SCHAFFNER
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Covington, Kentucky 41011
(606) 491-2100
Attorney for Petitioner

NOS. 79-5190, 79-5191, 79-5200, 79-5201, 79-5251

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

1980

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

ORDER

JAMES DOUGLAS HOLT, JR.,
WILLIAM JAMES AHLBRAND,
RICHARD LEWIS HERTHEL,
CHARLES DAVID JOHNSON,
JOHN CLYDE AHLBRAND,

Defendants-Appellants.

BEFORE: ENGEL, BROWN and KENNEDY, Circuit Judges.

Appellants, James D. Holt, Jr., William James Ahlbrand, Richard Lewis Herthel, Charles David Johnson, and John Clyde Ahlbrand appeal from their convictions for conducting an illegal gambling business in violation of 18 U.S.C. § 1955. On appeal they raise the following issues: (1) whether the evidence was sufficient to sustain a conviction; (2) whether expert testimony regarding the usual manner in which gambling card games are played was improperly admitted; (3) whether the jurisdictional prerequisites of the statute were met, including whether the gambling business met the thirty-day substantially continuous requirement; (4) whether the activities of some defendants amounted to conducting a gambling business within the meaning of the statute; (5) whether the District Court definition of "conduct" in the jury instructions was improper; (6) whether

§ 1955 gives adequate warning as to what constitutes criminal conduct; (7) whether the District Judge erred in not giving a requested circumstantial evidence instruction; (8) whether the United States Attorney's closing rebuttal argument was inflammatory and improper; (9) whether the District Judge erred in not granting additional peremptory challenges; (10) whether the District Judge improperly failed to suppress evidence in the possession of the prosecutor pursuant to an inadequate search warrant; (11) whether the District Judge erred in not granting separate trials; and (12) whether the District Judge improperly failed to grant a mistrial as to one defendant when his attorney claimed an inability to cross-examine a witness fully as a result of information about the witness gained from an attorney-client relationship with that witness. Upon consideration of the briefs and oral arguments of counsel together with the record on appeal, the Court concludes that the judgment rendered below and the decisions of the District Court on the issues raised were correct.

Accordingly, the judgment is affirmed.

ENTERED BY ORDER OF THE COURT

John A. Schumann

Clerk

Eastern District of Kentucky
FILED
JAN 16 1979
AT LEXINGTON
DAVID T. McCARVEY
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

UNITED STATES OF AMERICA

VS: NO. 79-1-S
(Title 18, USC, Section 1955)

JOHN CLYDE AHLBRAND,
CHARLES DAVID JOHNSON,
WILBERT JOSEPH HESCH, JR.,
a/k/a BILLY HESCH,
WILLIAM JAMES AHLBRAND,
JAMES DOUGLAS HOLT, JR.,
RICHARD LEWIS HERTHEL,
a/k/a "BUTCH" HERTHEL, and
WILLIAM J. VANDETTI

THE GRAND JURY CHARGES:

That from on or about the 1st day of August 1977 and continuously thereafter up to and including the 25th day of October 1977, at Newport, in the Eastern District of Kentucky,

JOHN CLYDE AHLBRAND,
CHARLES DAVID JOHNSON,
WILBERT JOSEPH HESCH, JR.,
a/k/a BILLY HESCH,
WILLIAM JAMES AHLBRAND,
JAMES DOUGLAS HOLT, JR.,
RICHARD LEWIS HERTHEL,
a/k/a "BUTCH" HERTHEL, and
WILLIAM J. VANDETTI

unlawfully, wilfully, and knowingly did conduct, finance, manage, supervise, direct and own all and a part of an illegal gambling business located at The Quality Sales Company, Inc. building, Ninth and Patterson Streets, Newport, Kentucky; said illegal gambling business involving BlackJack, poker, various other card games, and craps, in violation of the laws of the Commonwealth of Kentucky, Kentucky Revsied Statute Chapter 528, in which state said gambling business was conducted; said illegal gambling business involved, during the period aforesaid, five and more than five persons and others whose identity to the Grand Jury is unknown who conducted, financed, managed, supervised, directed, and owned all and a part thereof; and said gambling business

remained in substantially continuous operation for a period in excess of thirty (30) days and had a gross revenue of $2,000 in any single day; in violation of Title 18, United States Code, Section 1955.

A TRUE BILL

S. Thomas Hanin
FOREMAN

PATRICK H. MOLLOY
UNITED STATES ATTORNEY

NM 5 yrs./$20,000/both